MOTION FILED

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No. 09-725

IN THE

Supreme Court of the United States

THOMAS M. BEAVER, M.D.;
SIGURD J. NORMANN, M.D.; DIANA CARDONA, M.D.;
and THE UNIVERSITY OF FLORIDA BOARD OF TRUSTEES,
Petitioners,

v.

PATRICIA DANNEMANN,
Respondent.

On Petition for a Writ of Certiorari to the Florida First District Court of Appeal

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE THE FLORIDA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Florida Defense Lawyers Association ("FDLA"), by and through its undersigned counsel, hereby moves this Honorable Court for the entry of an Order granting the FDLA leave to appear as amicus curiae in the above captioned matter and in support thereof states:

1. The FDLA is a statewide organization of tort and insurance defense attorneys with over 1,000 members. This appeal involves issues that are of great importance to individuals represented by FDLA members who are subpoenaed to testify in Florida tort cases.

2. Specifically, the issues involved in the appeal effect the constitutionally protected right to engage in free speech within the context of the attorney-client relationship.

3. All counsel of record received timely notice of FDLA's intent to file an amicus curiae brief at least ten days prior to January 21, 2010 pursuant to Supreme Court Rule 37(2)(a). On January 9, 2010 James J. Taylor, Esq., responded via facsimile stating that he objects to FDLA appearing as amicus curiae.

4. Both the Florida Defense Lawyers Association and the Florida Justice Association (or its predecessor the Academy of Florida Trial Lawyers) appeared as amicus curiae by consent on the merits in the state court case involving plaintiff Dannemann, and on earlier cases involving the same central issues. *See Hannon v. Roper, 945 So.2d 534 (Fla. 1st DCA 2006); Michlik v. University of Florida Bd. of Trustees,* 17 So.3d 908 (Fla. 1st DCA 2009).

5. Because the members of the FDLA are regularly engaged in representing clients whose rights would be affected if the lower Court's ruling is allowed to stand, the FDLA is uniquely situated to file this amicus curiae brief, and the FDLA has a significant interest in the issues on appeal

6. The FDLA, as amicus curiae, can provide relevant materials to the Court not already brought to its attention by the parties and may be of considerable help to the Court in accordance with Supreme Court Rule 37 and should be granted leave to file this amicus curiae brief.

Therefore, the FDLA respectfully requests the entry of an Order granting it leave to file this amicus curiae brief

Respectfully submitted,

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Dated January 21, 2010.

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

The Florida Defense Lawyer's Association ("FDLA") is a statewide organization of tort and insurance defense attorneys with over 1,000 members[1]. The FDLA regularly provides amicus briefs to appellate courts in cases presenting significant issues of tort law and trial or pre-trial practice. The FDLA is uniquely situated to provide this court with commentary on whether a State court can prohibit an individual from communicating freely with legal counsel when they are subpoenaed, as a non-party, to provide deposition or trial testimony in a case alleging damages in tort. FDLA's members are regularly engaged to represent clients in response to subpoenas for testimony. The FDLA's members represent clients not only in a healthcare context but across a broad spectrum of industries, whose fundamental rights to counsel and to engage in free speech within the context of the attorney-client relationship would be impeded if this Court allows the ruling of Florida's First District Court of Appeal to stand.

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[1] In accordance with Rule 37.6, *amici* state that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Florida's First District Court of Appeal incorrectly interpreted Florida's Patient Privacy statute, section 456.057 (8), Florida Statutes (2007), and in so doing invaded vital and fundamental rights of individuals who have been called to testify as witnesses in cases alleging damages in tort. Specifically, the court's interpretation of the Florida Statute impeded an individual's or entity's right to engage an attorney and enjoy the benefit of full counsel so that the individual who has been subpoenaed to take part in the tort action has the ability to engage in full and frank discussions with counsel in order to insure the protection of their rights and obtain meaningful representation by the attorney of their choice.

The State court decision allows Florida's Patient Privacy statute to supersede the bedrock principles of an individual's federal constitutional guarantees of free speech under the First Amendment of the United States Constitution, the due process clause of the Fourteenth Amendment and an individual's guarantee of the right to legal counsel. The decision should be quashed as unconstitutional because these rights, which are the fundamental principles of our justice system, were infringed upon in the utter absence of any compelling state interest sufficient to warrant such a restraint and infringement on the constitutional rights of individuals brought into litigation as fact witnesses.

ARGUMENT

I. THE FLORIDA FIRST DISTRICT COURT OF APPEAL IMPROPERLY ERODED LONGSTANDING AND FUNDAMENTAL RIGHTS OF INDIVIDUALS INVOLVED IN LITIGATION IN FAVOR OF A STATE PRIVACY STATUTE

Florida's First District Court of Appeal decided *Dannemann* in a way that erodes the right of individuals in the State of Florida to retain counsel of their choice, and to engage in full and frank discussions with their attorney so that they may enjoy the benefit of meaningful representation.

The widespread implications of the First District's ruling have an extremely troubling effect on individuals who have been called to testify as a witness in cases alleging damages in tort, who seek the advice of counsel as to the possible legal implications of their testimony including the effect their testimony may have against their own interests. By prohibiting an individual from engaging in communication with their attorney in favor of a State patient privacy statute, the Florida court has set a dangerous precedent that such statutes are to be given greater weight than the primary right to counsel. The effect of the Florida decision is to discourage individuals from consulting with attorneys as to their legal rights and responsibilities.

The error of the Florida decision is clear when viewed in light of the history of the attorney-client privilege and the importance this Court has placed on that privilege. Neither the physician-patient privilege, nor other privileges implicated by a State privacy statute, is entitled to more protection than the attorney-client relationship.

The protection of communications between client and lawyer, as embodied in the attorney–client privilege, has been a bedrock principle of our justice system for hundreds of years. The purpose of the attorney-client privilege is to encourage full and frank communication between attorneys and their clients and thereby to promote broader public interests in observance of law and the administration of justice. *See Upjohn Co. v. United States,* 449 U.S. 383, 389 (U.S. Mich. 1981). The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. *See id.* The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out. *Trammel v. United States*, 445 U.S. 40, 51 (1980).

This Court has long upheld the importance of meaningful, substantive, complete, and confidential attorney-client communication.

In *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888), the Court espoused that the privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."

The Florida court's ruling flies squarely in the face of this Court's pronouncement not only by creating apprehension over having open and frank communication, but also by establishing adverse consequences for the disclosure of any such information and pronouncing the client to be in violation of a State privacy statute by engaging in what had previously been considered valid and vital communication with an attorney.

The Florida court's decision has broad-based implications that extend well beyond the specific facts of this case, to all manner of situations in which individuals and entities may wish to seek legal counsel for all manner of reasons. Florida's physician-patient privilege is a statutory privilege set forth in section 456.057 (8), Florida Statutes (2005). Other State and Federal laws also create rights to privacy – and if the Florida court's reasoning is applied in all of these contexts, the impact on the right to counsel would be staggering.

For example, privacy is afforded to records regarding mental health counseling under Florida Statute §394.4615, and communications between substance abuse counselors and their clients under Federal law found at 42 U.S.C.A. 290dd-2. If the Florida court's decision in *Dannemann* is allowed to stand, and the patient privacy statute is allowed to supersede the attorney-client privilege, it stands to reason that other such statutes will be used to invade an individual's right to seek counsel on the implications of their testimony when subpoenaed. It is important to note that the court in *Dannemann* made no findings of a compelling state interest to warrant the restraint and infringement upon the privacy of the fact witnesses at issue. Left unchecked, such ad hoc analysis and such startling erosion of the right to counsel and the attorney-client privilege threaten to destroy the sanctity of the attorney-client relationship, and to discourage individuals from consulting with attorneys as to their legal rights and responsibilities. *See THE ATTORNEY-CLIENT PRIVILEGE: FIXED RULES, BALANCING, AND CONSTITUTIONAL ENTITLEMENT, Harvard Law Review, December 1977.*

Those who are subpoenaed in cases alleging damages in tort, where their involvement with the plaintiff implicates a State privacy statute, are placed in an impossible situation wherein they are forced to either infringe on the plaintiff's privacy according to the state court's ruling, or be forced to testify without first having the aid and advice of counsel, potentially placing themselves, their property and their very livelihood at stake without the benefit of their constitutionally guaranteed right to counsel. Further, such uncounseled testimony has the very real potential to jeopardize the legal interests of such individuals' employers.

Thus, from the perspective of the individual witnesses and their employers alike, the Florida court's interpretation of the patient-privacy statute impedes the attorney-client relationship and privilege to a depth utterly unjustified by a plaintiff's claimed right to privacy in information that the plaintiff himself has placed at issue in a public legal proceeding.

It is not enough, as the state court suggests, to have some reasonable expectation or confirmation from the plaintiff that the party subpoenaed to testify will not be sued by the plaintiff. With the exposure in Florida to being named on the verdict form under *Fabre v. Marin*, 623 So.2d 1182 (Fla. 1993), the implications of a witness's testimony stretch far beyond the concern of being sued by the plaintiff alone.

Individuals who are named as *Fabre* defendants, who are found liable by juries, face a host of potential legal consequences. Unnamed *Fabre* defendants can face claims for contribution or indemnity and in the case of a physician witness, can be reported to national and state databanks and credentialing committees, and face negative media exposure, all of which can adversely impact an individual's livelihood. This exposure runs afoul of the protection of the Fourteenth Amendment of the United States Constitution in its guarantee that "no state shall... deprive any person of life, liberty, or property, without due process of law..." Physicians who face the prospect of testifying at depositions justifiably need the ability to communicate with legal counsel about the deposition process, testimonial issues that will likely be presented and the legal and professional impact of the testimony upon a physician. Physicians likewise need to be able to communicate with their employers or former employers about care rendered during the period of employment. Physicians in their healthcare groups need, in a broader sense, to be able to communicate freely about patient care and treatment to conduct the statutorily mandated risk management, quality assurance, peer review and credentialing processes. Further, attorneys involved in those processes or those who are retained by intra-facility groups and insurance companies serve to promote better medical care and efficiency as long as they can communicate and advise physicians on legal matters related to confidential patient information.

The Florida court's decision also effectively destroys the right to counsel of those who have been called to testify as witnesses in tort cases. It is well settled that the right to representation is basic to the system of justice and extends to every facet of the judicial process. Representation of a party by his duly constituted attorney is fundamental to the administration of justice and there is a constitutionally guaranteed right to retain counsel in civil matters under the due process clause of the Fourteenth Amendment. *See Texas Catastrophic Property Insurance v. Morales*, 975 F.2d 1178 (C.A. Texas 5th 1992). The right to counsel, expressly guaranteed by the Sixth Amendment in criminal cases, is no less fundamental in civil cases, and springs from both statutory authority and from the constitutional right to due process of law. *See McCuin v. Texas Power & Light Co.*, 714 F.2d 1255 (C.A. Texas 1983). The Florida court has interpreted the state statute in such a way that it improperly gives a stranger to the attorney-client relationship – ironically, the very person whose act created the need for attorney-client consultation - the total authority to control the communication within that relationship.

In deciding when a person subpoenaed in a civil matter may hire an attorney, and in placing limitations on the ability to communicate for both client and attorney, the Florida court's decision has improperly eroded the right to meaningful representation, to the point where a person's constitutional right to counsel has been unconstitutionally violated. The need for an open and unfettered exchange of information is vital not only to the interests of the client but it is necessary to insure that the attorney can accomplish the ethical goals of any representation. As the Court noted in Trammel, "The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant." ABA Code of Professional Responsibility, Ethical Consideration 4-1 states as follows:

> "A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant.

> The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance."

See Trammel, 449 U.S. 383 at 391.

Thus, the State Court's decision in Dannemann creates a scenario where not only can effective representation not take place, but the attorney is forced to violate his or her ethical obligations by taking part in a representation that is truncated by the State Court's prohibitions.

CONCLUSION

The issues presented in this matter are extremely important to a broad range of physicians, hospitals, practice groups, healthcare educators, and risk management programs. The Florida Court's decision will have a widespread and prejudicial impact on health care in the state. Perhaps even more troublesome is the widespread implication that this ruling has on the fundamental tenets of the attorney-client relationship and the constitutionally guaranteed right to counsel as well as freedom of speech within the bounds of the attorney-client relationship. This Court should grant the Petition for Writ of Certiorari and quash the decision of the state court in order to uphold the principles of the right to counsel under the Sixth and Fourteenth Amendments of the United States Constitution and of the attorney-client privilege.

Respectfully submitted,

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